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February 20, 2015

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28;
Framework for Broadband Internet Service, GN Docket No. 10-127**

Dear Ms. Dortch:

On February 18, 2015, Rick Chessen of the National Cable & Telecommunications Association (“NCTA”), along with the undersigned and Matthew Murchison of Latham & Watkins LLP, spoke by telephone with Stephanie Weiner of the Office of General Counsel in connection with the above-referenced proceedings. On February 19, 2015, the same group representing NCTA, along with Steven Morris of NCTA, met with Ms. Weiner and Marcus Maher of the Office of General Counsel, Matthew DelNero and Claude Aiken of the Wireline Competition Bureau, and Scott Jordan, the Commission’s Chief Technology Officer, regarding the same matters.

In both discussions, we reiterated that, in the event of any decision to reclassify broadband Internet access service as a Title II “telecommunications service,” the Commission should grant broad forbearance from Title II’s restrictions and obligations as an integral part of that decision.¹ We explained that doing so is necessary to preserve the deregulatory status quo to the maximum extent possible, and to ensure that such reclassification does not result in unnecessary, investment-stifling regulatory burdens on ISPs.

¹ See Letter of Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 12-22 (filed Dec. 23, 2014) (“NCTA Dec. 23 Ex Parte”); Letter of Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2-6 (filed Jan. 14, 2015) (“NCTA Jan. 14 Ex Parte”).

As in prior meetings,² we stressed that it is particularly important to forbear from the directive in Section 201(b) that all “charges” be “just and reasonable,”³ and that failing to do so would authorize the very sort of “rate regulation” that the Chairman, the President, and even the Commission’s recent “Fact Sheet” all purport to disclaim.⁴ We explained that allowing *post hoc* scrutiny of broadband rates through the filing of complaints (either before the Commission or in federal court) is no less “rate regulation” than *ex ante* requirements to file tariffs or to seek Commission approval for rate changes. Moreover, Section 201(b) is the primary source of authority for many of the Commission’s most sweeping and invasive regulations governing the rates for telecommunications services.⁵ We also pointed out, as we have previously, that Section 10’s reference to “any provision” authorizes the Commission to grant forbearance from specific language and requirements within sections of Title II—a proposition the Commission has recognized in the past.⁶ Accordingly, we emphasized once more that the Commission must forbear from the provision in Section 201(b) requiring just and reasonable “charges” if it is to make good on repeated pledges to avoid broadband rate regulation and the attendant harms to broadband investment and innovation.

We also reiterated that the Commission has authority under Section 10 to forbear from Sections 206 and 207. The plain language of Section 10 allows—indeed, *requires*, when the relevant factors are satisfied—the Commission to “forbear from applying any regulation or *any provision* of this Act to a telecommunications carrier or telecommunications service.”⁷ The Supreme Court accordingly has confirmed that Sections 206 and 207 are among the provisions from which the Commission “must forbear” if the factors in Section 10 are met.⁸ Moreover, as

² See, e.g., Letter of Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 1-2 (filed Feb. 11, 2015); Letter of Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2-4 (filed Feb. 12, 2015) (“NCTA Feb. 12 Ex Parte”) NCTA Jan. 14 Ex Parte at 5.

³ 47 U.S.C. § 201(b).

⁴ See NCTA Feb. 12 Ex Parte at 2 (collecting cites).

⁵ See Letter of Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 19 (filed Dec. 24, 2014) (collecting examples).

⁶ See NCTA Feb. 12 Ex Parte at 2-4 (citing *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators*; *Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, Order, 27 FCC Rcd 11532 (2012) (“*Section 652(b) Forbearance Order*”)).

⁷ 47 U.S.C. § 160(a) (emphasis added).

⁸ See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 975-76 (2005) (listing a variety of Title II provisions, including “47 U.S.C. §§ 201-209,” and

NCTA has explained, the Commission has interpreted its forbearance authority as extending to any provision in the Communications Act of 1934, as amended (the “Act”), that imposes burdens on or has “real world consequences” for telecommunications carriers.⁹ That standard is plainly met here, as Sections 206 and 207 directly expose telecommunications carriers to damages claims¹⁰ and private lawsuits.¹¹

In addition, we explained that the mere fact that Sections 206 and 207 relate to *judicial* enforcement of Title II, rather than purely *administrative* enforcement, does not somehow place those provisions beyond the Commission’s authority to grant forbearance. As noted above, Section 10, by its clear terms, applies to “any provision” of the Act that affects common carriers—not just to “any provision that entails Commission enforcement.” Nor should the terms “applying” in Section 10(a) and “enforcing” in Section 10(b) be construed as imposing such a limitation. It would plainly be reasonable for the Commission to construe the phrase “forbear from applying any regulation or any provision” in Section 10(a) to mean “forbear from *the application of* any regulation or any provision”—irrespective of whether the Commission or a court is doing the “applying.”¹² By the same token, the Commission could reasonably construe the phrase “forbearance from enforcing the provision” in Section 10(b) as “forbearance from *the enforcement of* the provision,” whether or not the Commission itself is the “enforcing” body in a particular case.¹³ The text of the statute does not compel a contrary reading, and for various reasons set forth below, the Commission would be well within its interpretive discretion under *Chevron* to construe the statute in this manner.

To begin with, the Commission has adopted a similar construction of closely analogous statutory language in Section 222(b),¹⁴ and was upheld by the D.C. Circuit in doing so.¹⁵ There, the Commission was interpreting language stating that “[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose.”¹⁶ The defendant

explaining that “[t]hese provisions are mandatory, but the Commission must forbear from applying them if it determines that the public interest requires it”).

⁹ Section 652(b) Forbearance Order ¶ 23; see also NCTA Feb. 12 Ex Parte at 4-5.

¹⁰ See 47 U.S.C. § 206 (providing that, if a common carrier violates a provision of Title II, “such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation”).

¹¹ See *id.* § 207 (providing that a person “may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act”).

¹² 47 U.S.C. § 160(a).

¹³ *Id.* § 160(b).

¹⁴ See *Bright House Networks, LLC v. Verizon Cal., Inc.*, 23 FCC Rcd 10704 ¶¶ 19-33 (2008) (“*Bright House Order*”).

¹⁵ See *Verizon Cal., Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009).

¹⁶ 47 U.S.C. § 222(b).

in a complaint proceeding had argued that the word “providing” in the statute could refer only to *the receiving carrier’s provision* of a telecommunications service, in part because the receiving carrier was the grammatical subject of the sentence in Section 222(b).¹⁷ But the Commission concluded that the statute was ambiguous in this respect, and that “providing” could reasonably be interpreted to mean “the provision of” telecommunications service by *either* the receiving carrier *or* the submitting carrier.¹⁸ The D.C. Circuit then affirmed the reasonableness of the Commission’s broad construction of “providing”; while it noted that “the first reading that comes to mind is that the statute covers only situations where the receiving carrier is the one providing such a service,” the court explained that “context is key,” and such a narrow reading of “providing” would threaten to frustrate Congress’s broad purposes in enacting the provision in question.¹⁹

The same is true with respect to the terms “applying” and “enforcing” in Section 10. As with “providing,” “applying” and “enforcing” are flexible enough to mean the “application” or “enforcement” of a given provision *either* by the Commission *or* by a court. Moreover, a narrower interpretation of these terms to mean *only* “the Commission’s application” or “the Commission’s enforcement” would frustrate Congress’s objectives. Under such a reading, the Commission’s grant of forbearance from a particular provision potentially would have no effect on a *court’s* ongoing ability to enforce that provision against a carrier. Thus, a carrier that had obtained forbearance from the Commission might still find itself subject to lawsuits alleging violations of the relevant statutory provision.²⁰ Such an outcome could lead to an untenable patchwork of inconsistent legal obligations that depend entirely on the forum in which the carrier finds itself. Moreover, this result would be entirely at odds with the deregulatory thrust of Section 10, which Congress intended to serve as a line-item veto that “ensures that regulations applicable to the telecommunications industry remain current and necessary in light of changes in the industry.”²¹ It thus would make little sense to interpret Section 10 as limiting forbearance to the Commission’s *own* application or enforcement of statutory provisions, while allowing such provisions to be left in place for possible application or enforcement by a court.

We also pointed out that if Congress had wanted to prevent the Commission from granting forbearance from Sections 206 and 207, it clearly knew how to do so. Section 10 specifically limits the Commission’s ability to forbear from Sections 251(c) and 271, but contains no such limitation with respect to Sections 206 and 207.²² This fact only underscores that Congress intended for the Commission to forbear from Sections 206 and 207 when it

¹⁷ See *Bright House Order* ¶ 20.

¹⁸ *Id.* ¶ 21.

¹⁹ *Verizon Cal.*, 555 F.3d at 345-46.

²⁰ Indeed, we are not aware of any case in which a court has held that the Commission’s decision to “forbear from applying” a particular provision was not binding on the court as well.

²¹ 141 Cong. Rec. S7893 (Jun. 7, 1995) (remarks of Sen. Pressler).

²² See 47 U.S.C. § 160(d).

determines that the statutory factors under Section 10 are met.²³ Even Section 332, which specifically bars the Commission from forbearing from Section 208's remedial provisions (as well as from Sections 201 and 202) for Commercial Mobile Radio Services, makes no mention of—and thus authorizes forbearance from—the remedial provisions in Sections 206 and 207.²⁴

Notably, the Commission has never before suggested that Sections 206 and 207 are somehow beyond its forbearance authority. To the contrary, the Commission's 2010 *Third Way NOI* proposed to retain *only* Sections 201, 201, 208, 222, 254, and 255, and to forbear from all other provisions of Title II, including Sections 206 and 207, with respect to broadband providers.²⁵ The *Third Way NOI* specifically sought comment on forbearance from Sections 206 and 207, and critically, it did so to explore whether forbearance from those provisions was *justified* under the statutory factors, not whether such forbearance was legally *possible* in the abstract.²⁶ Moreover, in one case, a carrier successfully obtained forbearance from Sections 206 and 207 because its petition for forbearance was “deemed granted” under Section 10(c).²⁷ If a such forbearance can be obtained by operation of law, it certainly also can be obtained through an affirmative grant by the Commission.

We also pointed out that the Commission seems poised to grant forbearance from other provisions in Title II that create private rights of action. The “Fact Sheet” released two weeks ago appears to indicate that the Commission will forbear from Section 227 in its entirety.²⁸ Notably, Section 227 contains two provisions—in subsections (b)(3) and (c)(5)—that establish private rights of action for claimed violations of certain requirements in Section 227 as well as

²³ See *TRW, Inc. v. Andrews*, 534 U.S. 19, 29 (2002) (“Where Congress explicitly enumerates certain exceptions to a general [rule], additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” (internal quotation marks and citations omitted)).

²⁴ See 47 U.S.C. § 332(c)(1)(A).

²⁵ See *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866 ¶ 74 (2010).

²⁶ See *id.* ¶ 77 (asking whether “the enforcement regime that would apply if we enforce only [S]ection 208 [would] be sufficient if we decide to forbear from the damages and jurisdictional provisions of [S]ections 206 (carrier liability for damages), 207 (recovery of damages and forum election), and 209 (damages awards)”).

²⁷ See News Release, *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law* (rel. Mar. 20, 2006).

²⁸ See Federal Communications Commission, “Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet,” at 3, Feb. 4, 2015, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-331869A1.pdf (listing “major provisions of Title II that will apply” and omitting Section 227).

any “regulations prescribed” thereunder.²⁹ While NCTA strongly supports forbearance from Section 227 as part of its broader call for complete forbearance from all restrictions and obligation in Title II, there is no reason for the Commission to deny forbearance from Sections 206 and 207 based on some reluctance to interfere with private rights of action, while at the same granting forbearance from the private rights of action contained in Section 227.

And indeed, as we have explained, the Commission plainly *should* use its authority under Section 10 to forbear from Sections 206 and 207 in the broadband context. Private suits and damages awards have never been necessary to protect broadband consumers in the past, and leaving these two provisions in place would be immensely destabilizing to the broadband industry. Particularly given the Commission’s plan to assert new enforcement authority under Section 208, subjecting broadband providers to new lawsuits is all the more unnecessary. As noted in NCTA’s prior submissions, the application of Sections 206 and 207 to broadband would open the floodgates to abusive class action lawsuits seeking exorbitant damages based on any broadband charges or practices with which plaintiffs’ lawyers might choose to take issue.³⁰ The Commission is all too familiar with the growing trend of class action lawsuits that aim to capitalize on ambiguities in the Commission’s rulings—most notably in the context of the Telephone Consumer Protection Act (“TCPA”).³¹ A regime that exposes the broadband industry to similar threats of abusive litigation would be anything but “light touch,” and could be particularly devastating for smaller ISPs, many of which cannot afford the cost of litigating or settling class action lawsuits. Forbearance from these provisions thus is not only permissible, it is imperative for ensuring that ISPs, large and small, can continue to devote their resources to the deployment of advanced broadband networks across the country.

Finally, we also reiterated points from earlier filings on several other important topics in this proceeding. In particular, we stressed that any regulatory standards governing Internet traffic exchange should apply to both sides of any interconnection arrangement, whether under Title II or under Section 706.³² We further urged the Commission to take concrete action in the upcoming Order to ensure that pole attachment rates for cable broadband providers do not

²⁹ 47 U.S.C. §§ 227(b)(3), (c)(5).

³⁰ See NCTA Feb. 12 Ex Parte at 2, 5 (collecting examples of class actions brought against carriers under Sections 206 and 207).

³¹ See, e.g., Commissioner Michael O’Rielly, “TCPA: It Is Time To Provide Clarity,” FCC Blog, Mar. 25, 2014, *available at* <http://www.fcc.gov/blog/tcpa-it-time-provide-clarity> (noting that, as the Commission’s rules implementing the TCPA “have become complex and unclear,” the number of TCPA lawsuits has grown dramatically); see also U.S. Chamber of Commerce, Institute for Legal Reform, *The Juggernaut of TCPA Litigation*, Oct. 2013, *available at* http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF (documenting the recent, dramatic rise in the number of TCPA class actions and in the damages awards sought by plaintiffs’ counsel).

³² See NCTA Dec. 23 Ex Parte at 22-25.

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increase as a result of reclassification.³³ Relatedly, we reemphasized that the Commission should include specific language in the Order precluding state and local authorities from seeking to impose franchise requirements, property taxes, or any other regulations or fees on broadband providers once reclassification takes effect.³⁴ We also noted that the Commission should not revise its transparency rule in a manner that imposes unnecessary burdens on ISPs and provides no material benefits to consumers.³⁵ And finally, we urged the Commission to clarify that broadband Internet access does not qualify as “exchange access” under the Act.³⁶

Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill
Matthew A. Brill
Counsel for the National Cable &
Telecommunications Association

cc: Claude Aiken
Matthew DelNero
Scott Jordan
Marcus Maher
Stephanie Weiner

³³ See Letter of Michael Powell, NCTA, and Matthew Polka, American Cable Association, to Chairman Tom Wheeler, GN Docket No. 14-28, WC Docket No. 07-245, at 1 (filed Feb. 19, 2015) (explaining that, “before any reclassification decision takes effect, the Commission should grant the pending reconsideration petition filed by [NCTA] and COMPTel in 2011, which would ensure that all broadband providers are able to attach to poles at the lowest rate available under the Commission’s rules”); see also Letter of Steven Morris, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 1-3 (filed Jan. 22, 2015); Letter of Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 1-2 (filed Jan. 9, 2015).

³⁴ See Letter of Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 1-2 (filed Feb. 4, 2015).

³⁵ See Comments of NCTA, GN Docket Nos. 14-28, 10-127, at 47-56 (filed Jul. 15, 2014).

³⁶ See Letter of Tim Stelzig, General Communication, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 1-2 (filed Feb. 19, 2015).